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Supreme Court, U.S.
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No: 654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ANTOINETTE M. FARACO, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Antoinette M. Faraco, by her counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 2) is reported at 29 T.C. No. 76. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix, *infra*, pp. 1a-4a.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 5a) was entered on November 3, 1958. Jurisdiction was conferred on the Court of Appeals by Section 7482(a) of the Internal Revenue Code of 1954, 26 U.S.C.,

Section 7482(a). Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Does the imposition upon a widow of a 40.37% additional income tax penalty solely because she lost her marital status by the death of her husband, constitute the taking of her property without due process of law, the denial of equal protection of law, the arbitrary confiscation of property, an unreasonable, capricious, and discriminatory classification for taxation, and the imposition of direct tax, in violation of any provision contained in Article 1, Section 2, Clause 3, Article 1, Section 9, Clause 4, the Fifth Amendment, the Fourteenth Amendment, or the Sixteenth Amendment of the Constitution of the United States?

2. Is the 1954 basis for depreciation of petitioner's bus terminal real estate (which she received as tenant by the entirety and/or as an inheritance under her husband's will upon his death on December 26, 1953) the valuation at which respondent required such real estate to be included for Federal estate tax purposes, rather than the unrecovered portion of the 1947 cost thereof, because

(a) such 1954 depreciation basis is controlled by Section 1014(a) of the Internal Revenue Code of 1954, making it clear that the date of death valuation applies, and

(b) Section 113(a)(5) of the Internal Revenue Code of 1939 under which the basis for depreciation was determined prior to 1954 was unqualifiedly repealed by the 1954 Code, leaving no basis for depreciation whatsoever unless Section 1014(a) of the 1954 Code controls?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

See Appendix, *infra*, pages 6a-12a.

STATEMENT

The facts were stipulated and are as follows:

Petitioner was married in 1933 and her husband died a resident of Virginia on December 26, 1953 (R. App. B 14). Petitioner was a widow during 1954 (R. App. B 14).

As stipulated, petitioner's 1954 income tax liability was increased by 40.37% (from $7,275.04 to $10,211.83) because she lost her marital status due to the death of her husband on December 26, 1953 (R. App. B 14).

On November 4, 1947, petitioner's husband purchased the bus terminal property located at 707 North Randolph Street, Arlington, Virginia, at a cost of $159,029.33 (R. App. B 14-15). Under the deed the property was held by petitioner and her husband until his death as tenants by the entirety with common law right of survivorship (R. App. B 14-15). The will of petitioner's husband, duly probated in Fairfax County, Virginia, gave, devised, and bequeathed all of his estate, both real and personal, to petitioner (R. 3).

Respondent determined that the bus terminal real estate was includible in the estate of petitioner's deceased husband at its full value at the date of death of $650,000 for Federal estate tax purposes and petitioner agreed that such determination was correct (R. 4). Respondent also determined that petitioner is entitled to depreciation only on the unrecovered portion of the basis of the 1947 cost of $159,029.33 rather than on the Federal estate tax valuation of $650,000 and the Court of Appeals has sustained respondent's position (App., *infra*, pp. 1a-4a). The Court of Appeals stated that the conclusion to which it was "forced" was "inherently inequitable" (App., *infra*, p. 2a). For the year involved, 1954, petitioner's income

tax liability would have been $5,477.87 less if she had been allowed depreciation as provided in Section 1014(a) of the 1954 Code on the basis of the Federal estate tax valuation.

The Tax Court completely avoided the constitutional issue as to the validity of a 40.37% additional income tax penalty on widowhood (R. 3-7). The Court of Appeals dealt with the constitutional issue and held that the 40.37% penalty imposed upon petitioner because she was a widow is "not unreasonable" as a classification for the imposition of income tax. The Court of Appeals concluded that because the 40.37% penalty on widowhood is "slight" such penalty "ran afoul of no constitutional guaranty" (App., *infra*, p. 4a).

On the depreciation issue, the Court of Appeals recognized "the unqualified repeal of § 113(a)(5) of the 1939 Code", under which respondent contended that the 1954 depreciation basis of the bus terminal was fixed. The Court further recognized that respondent's position was "inherently inequitable" but the Court felt "forced" to decide against petitioner because of its belief that only "Congress may remove" the obvious injustice to petitioner "however appealing" are "the equities of the taxpayer's situation here" (App., *infra*, pp. 2a-4a).

As will be shown below, petitioner respectfully maintains that the Court of Appeals has erroneously decided extremely important questions of Federal law on both the constitutional and depreciation issues.

REASONS FOR GRANTING THE WRIT

I. There Is Nothing "Slight" About the Imposition Upon a Widow of a 40.37% Additional Income Tax Penalty Solely Because She Lost Her Marital Status by the Death of Her Husband. Therefore, the Court of Appeals Erred on an Important Question of Federal Law in Holding That Such Unprecedented and Discriminatory Taking of Petitioner's Property "Ran Afoul of No Constitutional Guaranty" Because the Discrimination Is Allegedly "Slight".

1. The Court of Appeals apparently recognized, as it should, "that a Federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment." *Tyler* v. *United States*, 281 U.S. 497, 74 L. Ed. 999, 8 AFTR 10912 (1930); *Cohan* v. *Commissioner*, 39 F. 2d. 540, 545, 8 AFTR 10552 (CA 2, 1930); *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 66 L. Ed. 817 (1922); *A. Magnano* v. *Hamilton*, 292 U.S. 40, 78 L. Ed. 1109 (1934); *Heiner* v. *Donnan*, 285 U.S. 312, 76 L. Ed. 772, 10 AFTR 1609 (1932); *Nichols* v. *Coolidge*, 274 U.S. 531, 71 L. Ed. 1184, 6 AFTR 6758 (1927); *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, 80 L. Ed. 62, 16 AFTR 981 (1935), rehearing denied 296 U.S. 664, 80 L. Ed. 473, 16 AFTR 1283 (1935); *Eisner* v. *Macomber*, 252 U.S. 189, 64 L. Ed. 521, 3 AFTR 3020 (1920); and Mertens, *Law of Federal Income Taxation* (1956 Edition), Sections 4.01 and 4.09. It would seem also that the Court of Appeals was aware of the fact that petitioner is entitled to protection against gross discrimination under the equal protection clause of the Fourteenth Amendment. *Bowling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884 (1954); *Hurd* v. *Hodge*, 334 U.S. 24, 92 L. Ed. 1187, 1195 (1948); *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 208, 209, 89 L. Ed. 173 (1944); *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112, 93 L. Ed. 533 (1949); and *Hillsborough Township* v. *Cromwell*, 326 U.S. 620, 90 L. Ed. 358 (1946).

2. Thus the Court of Appeals' error is predicated upon its failure to recognize the *magnitude* of the unreasonable

and grossly discriminatory penalty imposed upon petitioner *solely because she was a widow.*

3. The penalty, of which petitioner complains, resulting from depriving her of the split income device due to the death of her husband, goes up to more than 45% each year and up to over $25,000.00 annually (R. 13 Ex. A 24-28). The split income device makes the marital status, *regardless of dependents or capacity to pay,* have an annual value of investment income on more than $11,000,000.00 (R. 13 Ex. A 22-24). The imposition of such ruinously heavy penalty on widowhood cannot properly be held to run "afoul of no constitutional guaranty" because it is allegedly "slight".

4. The President of the United States vetoed the split income device on the ground that it benefited less than 5% of taxpayers to the detriment of all other taxpayers (R. 13 Ex. A 11-12).

5. The late Randolph E. Paul explained to the Congress the seriousness of the gross discrimination brought about by the marital split income device whereby billions of dollars of taxes are shifted annually from the wealthiest taxpayers to those with the least capacity to pay (R. 13 Ex. A 9-11).

6. Senators Douglas and O'Mahoney and Congressmen Combs, McCormack, Sabath and Eberharter explained in detail what would be the disastrous consequences to the economy of the United States by reversing "the historic principle of taxation based upon ability to pay" and embarking upon grossly discriminatory taxation upon those having the least capacity to pay (R. 13 Ex. A 12-29). In addition to confiscating earnings of 95% of the taxpayers having the *least capacity to pay* for the benefit of 5% having the *greatest capacity to pay,* as the President's veto message explained would be the case, the split income device has already resulted in increasing the National Debt by approximately $40 billion dollars and greatly increased the carrying charge of that Debt (R. 13 Ex. A 29-30).

7. It is now well understood that if the value of the dollar continues to decline for the next 30 years at the rate of decline during the past 30 years the dollar will have a zero value in 1988. What is seemingly not understood, however, is that the decline will greatly accelerate as the carrying charge on the National Debt pyramids due to the failure to meet current expenses from taxation (R. 13 Ex. A 30).

8. Respondent defended the split income device below on the ground that its enactment was necessary in order to prevent *mass migration* of wealthy married people from common law states to community property states *to escape grossly discriminatory taxation* (R. 7 App. A). The Court of Appeals erred in deciding against petitioner on this spurious ground (App., *infra*, p. 4a). The fact is that the split income device was an even greater boon to many married taxpayers in the community property states than in the common law states, because it provided for the splitting of pre-marital estate income and the preventing of one-half of earned income from being added to pre-marital estate income and being taxed in the higher brackets (R. 13 Ex. A 12-13). But, accepting respondent's contention at face value, *the United States affords no sanctuary to which the widowed petitioner may migrate to escape the grossly discriminatory penalty taxation admittedly imposed upon her.* Consequently, petitioner, who has no other place to go, comes to this Court for protection and relief under the Constitution to which she is justly entitled.

9. The holding below that petitioner is entitled to the protection of "no constitutional guaranty" because the huge 40.37% penalty imposed upon her is "slight" is just as erroneous as it would have been for this Court to have held in *Bowling* v. *Sharpe*, *supra*, that discrimination in the public schools of the District of Columbia was so "slight" as to be beyond the reach of the Constitution because Negro and White schools were located only a few blocks apart.

10. Petitioner respectfully submits that the constitutional issue here involved presents one of the most serious questions of Federal law that has ever been presented to any court in the United States. See Entire Record.

II. The Court of Appeals Held That the Basis for Depreciation Provided in Section 113(a)(5) of the 1939 Code Was Unqualifiedly Repealed by the 1954 Code. The Court Further Held That Section 1014(a) of the 1954 Code Provided a "Reasonable Rule" Granting Depreciation on the Basis of Federal Estate Tax Valuation. The Court Erred in Holding That Section 1014(b)(9) of the 1954 Code Limited 1014(a) as to Petitioner's Property and Deprived Her of Any Basis for Depreciation Whatsoever.

11. Respondent contended below that the 1954 depreciation basis of petitioner's bus terminal real estate was controlled by Section 113(a)(5) of the 1939 Code and fixed at its original 1947 cost regardless of the $650,000-valuation for Federal estate tax purposes. The Court of Appeals correctly held that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed by the 1954 Code (App., *infra*, p. 2a). See 1954 Code Sections 1052(c) and 7851(a)(1)(C) which make it clear that Congress deliberately repealed Section 113(a)(5) of the 1939 Code and deliberately refrained from carrying over to 1954 and subsequent years the basis provision contained in Section 113(a)(5) of the 1939 Code.

12. It is clear, as held by the Court of Appeals below, that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed and superseded for all purposes by Section 1014 of the 1954 Code (R. 21-26).

13. Section 1014(a) of the 1954 Code eliminated the restrictive words "by bequest, devise or inheritance" upon which this Court's opinion in *Lang* v. *Commissioner of Internal Revenue*, 289 U.S. 109, 77 L. Ed. 1066, 12 AFTR 45 (1933), was based. Thus it is entirely clear that the Congressional purpose was to provide *a uniform basis for depreciation for all taxpayers in 1954 and subsequent years* regardless of whether property was acquired by

survivorship or bequest, devise, or inheritance. The Court of Appeals seemingly recognized this purpose by its reference to the "reasonable rule" of Section 1014 and "the liberalized rule" provided therein (App., *infra*, p. 3a). The Treasury Regulations (T.D. 6265, filed November 6, 1957, Section 1.1014-4) state the general purpose of Section 1014(a) as follows:

> "*Uniformity of basis; adjustment to basis*—(a) *In general.* (1) The basis of property acquired from a decedent, as determined under Section 1014(a), *is uniform in the hands of every person having possession or enjoyment of the property at any time* under the will or other instrument or under the laws of descent and distribution. The principle of uniform basis means that the basis of the property (to which proper adjustments must, of course, be made) will be the same, or uniform, whether the property is possessed or enjoyed by the executor or administrator, the heir, the legatee, or devisee, or the trustee or beneficiary of a trust created by a will or an inter vivos trust. In determining the amount allowed or allowable to a taxpayer in computing taxable income as deductions for depreciation or depletion under section 1016(a)(2), the uniform basis of the property shall at all times be used and adjusted." (Emphasis supplied)

14. The Court of Appeals concluded, however, that it was "forced" to hold that Congress intended to restrict "the liberalized rule" of 1954 Code Section 1014(a) because of the provisions of Section 1014(b)(9). The result of its holding that 1939 Code Section 113(a)(5) was unqualifiedly repealed and that 1954 Code Section 1014(a) does not apply is that petitioner is *left with a zero basis* for determining either depreciation or gain or loss upon disposition of the bus terminal property which her husband purchased at a cost of $159,029.33 and on which his estate was required to pay Federal estate tax at a $650,000 valuation. This, of course, is tantamount to confiscation of her property.

15. Petitioner respectfully maintains that the Court of Appeals has erroneously decided a most important question of Federal law depriving petitioner, and all others similarly situated, of any basis for depreciation when Congress clearly intended no such result and avoided enacting any language requiring such an inequitable decision. The Court of Appeals is in accord with petitioner's view that had Congress stopped with Section 1014(a), she would be entitled to the Federal estate tax valuation for depreciation purposes. Section 1014(a) fixes the basis for depreciation, from 1954 on, for all purposes "except as otherwise provided", but simply makes it doubly clear that with respect to all decedents dying after December 31, 1953, just as in the case of all other decedents dying before that date, the Federal estate tax valuation shall control for 1954 and subsequent years.

16. Undoubtedly, as stated in T.D. 6265 quoted above, the purpose of 1954 Code Section 1014(a) was to provide a basis "*uniform in the hands of every person having possession or enjoyment of the property at any time*" from 1954 on. Had Congress intended otherwise it would not have unqualifiedly repealed 1939 Code Section 113(a)(5) and deliberately refrained from preserving and carrying over the basis provided in Section 113(a)(5). This is obvious when it is realized that in every Revenue Act Congress has preserved and carried over the March 1, 1913 basis and every other basis for property which it intended to apply for subsequent years (R. 21-26).

17. Even had the 1954 Code been the product of skillful draftsmen there would clearly be no reason to think that the uniform basis of Section 1014(a) was destroyed by Section 1014(b)(9) leaving petitioner, and all others similarly situated, without any basis whatsover. But, when it is realized that the 1954 Code was the product of such inept drafting that the Treasury Department has not been able to this day to complete its Regulations thereunder, there can certainly be no reason for the strained

reasoning, not advanced by either party, which the Court of Appeals has adopted *sua sponte* in holding that the 1954 Code *deprived petitioner of any and all basis for depreciation.*

18. The Court of Appeals takes the position that "only Congress may remove" the inequity. Petitioner maintains that a reasonable construction of Section 1014 leaves no doubt that she is entitled to the uniform basis for depreciation provided for all other taxpayers under Section 1014 of the 1954 Code.

19. It is respectfully submitted that the Court of Appeals' holding that petitioner has no basis for depreciation of her bus terminal property is based upon a clearly erroneous principe of important Federal law and should be dealt with by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7717.

ANTOINETTE M. FARACO, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued October 21, 1958. Decided November 3, 1958.)

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and BRYAN, District Judge.

David R. Shelton for Petitioner, and Carter Bledsoe, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General; Lee A. Jackson and Melva M. Graney, Attorneys, Department of Justice, on brief) for Respondent.

HAYNSWORTH, Circuit Judge:

Mrs. Faraco and her former husband, as tenants by the entirety with right of survivorship, were the owners of improved real estate in Arlington, Virginia. The original cost was $159,029.33, but, when the husband died on December 26, 1953, it had a fair market value of $650,000. For purposes of the Federal Estate Tax, it was includible in the gross estate of the husband at the current market value. The taxpayer contends that she should be allowed the stepped-up basis for depreciation of the im-

provements in computing her 1954 income tax. The Tax Court denied her claim,[1] and she has appealed.

Though the husband, by will, left his entire estate, real and personal, to his wife, it is clear that she, as the survivor of the tenants by the entirety, holds her present estate, under the laws of Virginia, by virtue of the deed, and she acquired nothing under the will of the husband, *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E. 2d 599. Since she acquired no interest in the land by devise or inheritance, she is limited, under the 1939 Code, to depreciation upon the basis of original cost. *Lang* v. *Commissioner*, 289 U.S. 109, 53 S. Ct. 534, 77 L.Ed. 1066. The fact that Virginia now imposes an inheritance tax upon the surviving tenant based upon the value of the property does not alter the situation, for Virginia, as its statute clearly undertakes to do, may impose an inheritance tax upon her interest despite the fact that she is not the inheritor of the terminated interest of the husband. The extension of the reach of Virginia's inheritance ta[illegible]d not change the rights of tenants by the entirety under its substantive law.

Subjecting the property to the estate tax at current values upon the death of a co-tenant by the entirety while denying the survivor a stepped-up depreciation basis is so inherently inequitable that the Congress changed the rule of the 1939 Code. Under § 1014 of the 1954 Code, the survivor is entitled to the stepped-up basis for depreciation if the co-tenant died after December 31, 1953, 26 USCA 1014, but Congress did nothing to relax the restrictive provisions of § 113(a) (5) of the 1939 Code if the death of the decedent occurred prior to January 1, 1954.

The taxpayer contends that the unqualified repeal of § 113(a) (5) of the 1939 Code and the substitution of § 1014 of the 1954 Code gives the taxpayer the right to take depreciation under § 1014 for a tax year beginning after December 31, 1953, even though § 113 of the 1939 Code would

[1] 29 T. C. 674.

govern her basis in computing her 1939 income tax. The argument is that the cost basis is not an inflexible thing and is redeterminable each year under the provisions of the then applicable law. Doubtless the Congress could permit a redetermination of cost basis, though it be dependent initially upon a taxable event occurring when different rules of an earlier act were applicable.

However appealing the equities of the taxpayer's situation here, we cannot find that the Congress did provide for a redetermination of previously fixed cost bases. The reasonable rule of Section 1014[2] is limted by paragraph (b) (9) to those cases in which the decedent died after December 31, 1953. We find nothing in paragraph (a), or elsewhere in the 1954 Code, which modifies or overrides this express limitation, and are forced to the conclusion that Congress intended to restrict the liberalized rule in accordance with its clear expression in Section 1014 (b)

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[2] "Sec. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

"(a) *In General.*—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

"(b) *Property Acquired from the Decedent.*—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * * * *

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross state under chapter 11 of subtitle B or under the Internal Revenue Code of 1939 * * *"

(9). It is true that in Section 1052(c) of the 1954 Code, Congress expressly provided for the continuation of a basis previously determined under Sections 113(a) (6), (7), (8), (13), (15), (18), (19) or (23) of the 1939 Code. The omission of any reference to paragraph (5) suggests that Congress may have contemplated a readjustment of the basis in this situation to the value at the date of death of the decedent even though occurring prior to January 1, 1954. What inference we may draw from the omission in Section 1052(c) must give way, however, to the express limitation in Section 1014(b) (9). If, as the taxpayer speculates, that limitation got in by inadvertence, Congress may remove it, but, until then, the Court may not disregard it.

Taxpayer also seeks to recover the difference in the tax paid upon her 1954 income and the amount of tax which would have been due if a husband and wife reported the same income and deductions upon a joint return. Permitting married taxpayers to use the split income device of § 2 of the 1954 Code, 26 USCA § 2, while withholding the privilege from single persons, she says is such an arbitrary and unreasonable discrimination that it cannot be allowed under the Constitution. Classification of taxpayers according to marital status is not unreasonable, however, and there was much reason behind the purpose to equalize the tax burden as it falls upon married couples in common law states in comparison with those in community property states. The fact that the change gave a proportionately greater tax reduction to married couples with large incomes is wholly irrelevant; if the rapid acceleration of the progressive tax rates ran afoul of no constitutional guaranty, a slight withdrawal may not be said to have done so.

We find no merit in the taxpayer's contentions.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7717.

ANTOINETTE M. FARACO, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION to Review the Decision of the Tax Court of the United States.

THIS CAUSE came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the decision of the said Tax Court of the United States, in this cause, be, and the same is hereby, affirmed.

November 3, 1958.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

Filed November 3, 1958.

R. M. F. Williams, Jr. *Clerk.*

A true copy, Teste :

RICHARD M. F. WILLIAMS, JR., *Clerk,*
U. S. Court of Appeals for the Fourth Circuit.

(Seal)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Constitution:

ARTICLE 1, SECTION 1, CLAUSE 3:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

ARTICLE 1, SECTION 9, CLAUSE 4:

> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

FIFTH AMENDMENT:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT, SECTION 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SIXTEENTH AMENDMENT:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Internal Revenue Code of 1954:

"SEC. 2. TAX IN CASE OF JOINT RETURN OR RETURN OF SURVIVING SPOUSE.

"(a) Rate Of Tax.—In the case of a joint return of a husband and wife under section 6013, the tax imposed by section 1 shall be twice the tax which would be imposed if the taxable income were cut in half. For purposes of this subsection and section 3, a return of a surviving spouse (as defined in subsection (b)) shall be treated as a joint return of a husband and wife under section 6013."

"SEC. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

"(a) In General.—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

"(b) Property Acquired from the Decedent.—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * *

"(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions

(including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. This paragraph shall not apply to—

(A) annuities described in section 72;

(B) property to which paragraph (5) would apply if the property had been acquired by bequest; and

(C) property described in any other paragraph of this subsection."

"SEC. 7851. APPLICABILITY OF REVENUE LAWS.

"(a) General Rules.—Except as otherwise provided in any section of this title—

"(1) Subtitle A.—

"(A) Chapters 1, 2, 4, and 6 of this title shall apply only with respect to taxable years beginning after December 31, 1953, and ending after the date of enactment of this title, and with respect to such taxable years, chapters 1 (except sections 143 and 144) and 2, and section 3801, of the Internal Revenue Code of 1939 are hereby repealed.

* * * * *

"(C) Any provision of subtitle A of this title the applicability of which is stated in terms of a specific date (occurring after December 31, 1953), or in terms of taxable years ending after a specific date (occurring after December 31, 1953), shall apply to taxable years ending after such specific date. Each such provision

shall, in the case of a taxable year subject to the Internal Revenue Code of 1939, be deemed to be included in the Internal Revenue Code of 1939, but shall be applicable only to taxable years ending after such specific date. The provisions of the Internal Revenue Code of 1939 superseded by provisions of subtitle A of this title the applicability of which is stated in terms of a specific date (occurring after December 31, 1953) shall be deemed to be included in subtitle A of this title, but shall be applicable only to the period prior to the taking effect of the corresponding provision of subtitle A.'"

Internal Revenue Code of 1939:

"SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

"(a) Basis (Unadjusted) of Property.—The basis of property shall be the cost of such property; except that—

* * * * * *

"(5) Property Transmitted At Death.—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *"

Treasury Regulations promulgated under the Internal Revenue Code of 1954:

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-1. *Basis of property acquired from a decedent*—(a) *General rule.* The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the Federal estate tax. Accordingly, the general rule is that the basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death, or, if the decedent's executor so elects, at the alternate valuation date prescribed in section 2032, or in section 811(j) of the Internal Revenue Code of 1939. Property acquired from a decedent includes, principally,

property acquired by bequest, devise, or inheritance, and, in the case of decedents dying after December 31, 1953, property required to be included in determining the value of the decedent's gross estate under any provision of the Internal Revenue Code of 1954 or the Internal Revenue Code of 1939. * * *

* * * * *

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-2.—*Property acquired from a decedent*—(a) *In general.* The following property, except where otherwise indicated, is considered to have been acquired from a decedent and the basis thereof is determined in accordance with the general rule in § 1.1014-1:

"(1) Without regard to the date of the decedent's death, property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, whether the property was acquired under the decedent's will or under the law governing the descent and distribution of the property of decedents. * * *

* * * * *

"(b) *Property acquired from a decedent dying after December 31, 1953*—(1) *In general.* In addition to the property described in paragraph (a) of this section, and except as otherwise provided in subparagraph (3) of this paragraph, in the case of a decedent dying after December 31, 1953, property shall also be considered to have been acquired from the decedent to the extent that both of the following conditions are met: (i) the property was acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), and (ii) the property is includible in the decedent's gross estate under the provisions of the Internal Revenue Code of 1954, or 1939, because of such acquisition. The basis of such property in the hands of the person who acquired it from the decedent shall be determined in accordance with the general rule in § 1.1014-1. * * *"

"Reg. (T.D. 6265, filed 11-6-57.) § 1.1014-4.—*Uniformity of basis; adjustment to basis*—(a) *In general.* (1) The basis of property acquired from a

decedent, as determined under section 1014(a), is uniform in the hands of every person having possession or enjoyment of the property at any time under the will or other instrument or under the laws of descent and distribution. The principle of uniform basis means that the basis of the property (to which proper adjustments must, of course, be made) will be the same, or uniform, whether the property is possessed or enjoyed by the executor or administrator, the heir, the legatee, or devisee, or the trustee or beneficiary of a trust created by a will or an inter vivos trust. In determining the amount allowed or allowable to a taxpayer in computing taxable income as deductions for depreciation or depletion under section 1016(a)(2), the uniform basis of the property shall at all times be used and adjusted. The sale, exchange, or other disposition by a life tenant or remainderman of his interest in property will, for purposes of this section, have no effect upon the decedent. Thus, gain or loss on sale of trust assets by the trustee will be determined without regard to the prior sale of any interest in the property. Moreover, any adjustment for depreciation shall be made to the uniform basis of the property without regard to such prior sale, exchange, or other disposition."

Treasury Regulations 111 promulgated under the Internal Revenue Code of 1939:

"Reg. 111, Sec. 29.113(a)(5)-1 (As amended by T.D. 5687, Feb. 16, 1949, and T.D. 6020, June 17, 1953). *Basis of property acquired by bequest, devise, or inheritance.*—(a) *Property included.* Section 113(a)(5) applies—

"(1) to all property passing from a decedent by his will or under the law governing the descent and distribution of property of decedents;

"(2) to property passing under an instrument which, under section 113(a)(5), is treated as though it were a will, but applies to such property only at the times and to the extent prescribed in section 113(a)(5);

* * * * * *

"(c) *Fair market value.*—For the purposes of this section, the value of property as of the date of the death of the decedent as appraised for the purpose of the Federal estate tax or the optional value as appraised for such purpose, whichever is applicable as provided in paragraph (3) of subsection (b) of this section, or if the estate is not subject to such tax, its value appraised as of the date of the death of the decedent for the purpose of State inheritance or transmission taxes, shall be deemed to be its fair market value at the time of acquisition."

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No. 654

In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTOINETTE M. FARACO, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Tax Court (R. 2-7)[1] is reported at 29 T.C. 674. The opinion of the Court of Appeals (Pet. 1a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1958. (Pet. 5a.) The petition for a writ of certiorari was filed on January 19, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

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[1] Record references ("R.") are to the appendix to the brief for the petitioner filed in the court below. Supplemental record references ("Supp. R.") are to the appendix to the brief for the respondent filed in the court below.

QUESTIONS PRESENTED

1. Whether taxpayer's basis for a certain bus terminal property acquired by her and her late husband as tenants by the entirety is, under Section 113(a) of the Internal Revenue Code of 1939, the cost of the property rather than the fair market value of the property at the date of her husband's death.

2. Whether Section 2 of the Internal Revenue Code of 1954, containing the so-called split income provisions applicable to joint returns filed by husband and wife, is constitutional.

STATUTES INVOLVED

Sections 113(a) and 114(a) of the Internal Revenue Code of 1939 and Sections 1014(a) and (b) and 7851(a) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 6-8.

STATEMENT

The taxpayer's husband died on December 26, 1953, leaving all of his estate to the taxpayer. At the husband's death, the taxpayer and her husband held, by previous acquisition, certain bus terminal property as tenants by the entirety with common law rights of survivorship, 68.55 percent of the basis of which was allocable to depreciable improvements. The original cost of the property was $159,029.33. (Supp. R. 27-28.) Its fair market value at the date of the death of the taxpayer's husband was $650,000. (R. 4.)

On her 1954 income tax return, the taxpayer claimed depreciation with respect to the bus terminal property on the basis of the original cost of the property but in 1956 filed a claim for refund of $2,920.01 on the ground that she was entitled to claim depreciation on

the basis of the fair market value of the property at the time of her husband's death. (R. 4.) The Tax Court held that her basis for the property was its original cost (R. 4-5), and the Court of Appeals affirmed (Pet. 1a-2a).

Contending that Section 2 of the Internal Revenue Code of 1954 is unconstitutional, the taxpayer also sought in the Tax Court to recover the difference in the tax paid on her 1954 return and the amount of tax which would have been due if she had been married during that year and thus entitled to file a joint return with her husband under Section 2. The Tax Court held that the constitutional issue was not sufficiently raised in the taxpayer's petition for review (R. 6), and the Court of Appeals, affirming on this issue, held that 1954 Code Section 2 is constitutional (Pet. 4a).

ARGUMENT

1. The court below correctly held that, under Section 113(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 6), the original cost of the bus terminal property was the taxpayer's depreciation base for the property. Under Section 113(a), the cost of property is the depreciation base unless the situation falls within one of the listed exceptions. The taxpayer relied upon the exception listed in paragraph (5), which provides that, if the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of the property at the time of such acquisition. The court below, following this Court's decision in *Lang* v. *Commissioner*, 289 U.S. 109, properly held that exception to be inapplicable because there is no new acquisition by the survivor as to property held as tenants by the entirety.

As the court below noted (Pet. 2a-4a), Section 1014(b)(9) of the Internal Revenue Code of 1954 (Appendix, p. 7), on which the taxpayer also relies, is limited to those cases in which the decedent died after December 31, 1953. Consequently, it is not applicable here where the decedent died on December 26, 1953.

Further, there is no merit in the taxpayer's assertion (Pet. 9) that Section 113(a)(5) of the 1939 Code was unqualifiedly repealed by the 1954 Code and that the taxpayer is in effect left with a zero basis. Section 113(a) was only repealed with respect to taxable years beginning after December 31, 1953. See Section 7851 of the 1954 Code (Appendix, *infra*, p. 8).

2. The court below was clearly correct in holding that Section 2 of the Internal Revenue Code of 1954, containing the so-called split income provisions applicable to joint returns filed by husband and wife, is constitutional. Congress has, of course, wide latitude in the field of taxation. *Nichols* v. *Coolidge*, 274 U.S. 531; *Heiner* v. *Donnan*, 285 U.S. 312; *Brushaber* v. *Union Pacific R. Co.*, 240 U.S. 1. Income splitting through filing joint returns is a privilege (cf. *Sullivan* v. *Commissioner*, 256 F. 2d 664 (C.A. 4th)) which Congress was not required to extend to single persons (although in Section 2 Congress has extended the privilege for two years to surviving spouses meeting certain requirements, under which the taxpayer apparently could not qualify).[2] The difference between married and single status affords a permissible basis for different tax

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[2] The split income provision was first enacted in 1948 by the addition of Section 12(d) to the Internal Revenue Code of 1939. Revenue Act of 1948, c. 168, 62 Stat. 110, Sec. 301.

treatment and there is plainly no invidious discrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
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FEBRUARY, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(5) *Property transmitted at death.*—If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

(a) *Basis for Depreciation.*—The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property.

* * * * *

(26 U.S.C. 1952 ed., Sec. 114.)

Internal Revenue Code of 1954:

SUBTITLE A—INCOME TAXES

* * * * *

CHAPTER 1—NORMAL TAXES AND SURTAXES

* * * * *

SEC. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

(a) *In General.*—Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

(b) *Property Acquired from the Decedent.*—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

* * * * *

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required

to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. * * *

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 1014.)

SEC. 7851. APPLICABILITY OF REVENUE LAWS.

(a) *General Rules.*—Except as otherwise provided in any section of this title—

(1) *Subtitle A.*—

(A) Chapters 1, 2, 4, and 6 of this title shall apply only with respect to taxable years beginning after December 31, 1953, and ending after the date of enactment of this title, and with respect to such taxable years, chapters 1 (except sections 143 and 144) and 2, and section 3851, of the Internal Revenue Code of 1939, are hereby repealed.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7851.)

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